86-1208

Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

IAN C. CHAPPELL PETITIONER

vs.

GTE PRODUCTS CORPORATION RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States:

Ian C. Chappell, the petitioner herein, prays that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 14, 1986.

QUESTIONS PRESENTED

This is an age discrimination case in which the jury found in favor of the petitioner herein, Ian C. Chappell, on the issues of discrimination and willfulness. The trial judge set aside the jury's verdict which was affirmed by the Court of Appeals.

ISSUE

Is circumstantial evidence sufficient to meet the burden set forth in Burdine's indirect method of proof?

LIST OF ALL PARTIES TO THIS PROCEEDING

1. Petitioner, Ian C. Chappell

   (Plaintiff/Appellant)

2. Respondent, GTE Products

   Corporation

   (Defendant/Appellee)

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REPORTS OF OPINIONS BELOW

Ian C. Chappell vs. GTE Products Corporation. Memorandum Opinion and Order, (D.C.E. Ky) rendered April 5, 1985, not reported but included in Appendix herein.

Ian C. Chappell vs. GTE Products Corporation, 803 F.2d 261 (6th Cir. 1986) (Included in Appendix herein)

JURISDICTIONAL GROUNDS

The date of the judgment sought to be reviewed herein is October 14, 1986. The jurisdiction of The Supreme Court is invoked under 28 USC Section 1254(1).

STATUTE

29 USCS,Section 623(a)(1) Prohibition of Age Discrimination

1. "Employer Practices". It shall be unlawful for an employer-

(1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age

STATEMENT OF THE CASE

This is an age discrimination action brought by petitioner, Ian Chappell, pursuant to 29 USC, Section 623(a)(1).

This case was tried before a jury in United States District Court in Lexington, Kentucky. The trial began Wednesday, December 12, 1984, and the jury returned its verdict of willful violation of ADEA on Monday, December 17, 1984. On motion by the defendant, the trial judge entered a Judgment NOV on April 5, 1985. Petitioner filed an appeal with the United States Court of Appeals for the Sixth Circuit which affirmed the Judgment below on October 14, 1986.

The Evidence

Petitioner, Mr. Ian Chappell, was a life-long employee of the defendant. Except for two minor interruptions, he had been with the defendant in an engineering

capacity since he was 26 years old in 1952. He was 56 years old on the date he was laid off by the defendant in November of 1982. (Doc. 77, p.15) He holds a Bachelor of Science Degree in Engineering (Doc. 77, p.14).

Petitioner's career was as a Design Engineer (Doc. 77, p. 15) until he was suddently demoted in June of 1980, eight (8) levels to a G-4 Technician. This demotion came immediately after he had received a "fully satisfactory" evaluation by his superiors. (Doc. 77, p. 21) No justification was ever given by the defendant at the trial of this case for this sudden and apparently undeserved demotion.

The demotion took petitioner from the privileged environment of the Design Engineering Department (NPD) to dirty, tough, strenuous, hard manual labor as a technician in the dichroic coating room of the defendant. (Doc. 77, p. 35-37)

Following a six month tenure in the dichroic coating room, petitioner was transferred to a production line known as the PAR line as a technician. (Doc. 77, p. 37)

The PAR line to which plaintiff was transferred in November of 1980 consisted of three (3) manufacturing lines producing about 9,000 lamps per shift per line. (Doc. 77, p. 42) As a PAR line technician petitioner's primary responsibility was to control "shrinkage" which is another term for "spoilage". (Doc 77, p. 42-43) The measurement of the amount of "shrinkage" was the only objective measurement of petitioner's performance while on the PAR line. (Doc. 77, p. 42-43)

The evidence was undisputed that the shrinkage began to reduce sharply and dramatically from the time petitioner entered the PAR line until he was laid off in November of 1982. (Doc. 77, p. 55) This

reduction in shrinkage resulted in a saving to the defendant of approximately $28,000 per month. (Doc. 78, p. 73) Following petitioner's replacement by Jo Ann Miller, a 42 year old woman, in November of 1982, the shrinkage began an increase and eventually returned to approximately the level it had been when petitioner came on the line. (Doc. 79, p. 49)

When petitioner arrived on the PAR line he was, for the first time in his entire career, subjected to sharp and constant criticism by the defendant. The chief perpetrator of this criticism was Mr. William G. Thiery, a supervisor one level removed from the petitioner. This criticism took the form of numerous meetings with Mr. Thiery wherein Mr. Thiery berated petitioner's performance. (Doc. 77, p. 66) Mr. Thiery did not have day-to-day personal contact with the petitioner. (Doc. 78, p. 68) Importantly, Mr. Thiery's criticisms of

the petitioner were all general and subjective in nature and delivered in such a way that it was impossible for petitioner to do anything to correct or improve himself. (Doc. 77, p. 67 and Doc. 78, p. 27) Specifically, Mr. Thiery criticized petitioner stating that petitioner was not decisive, flexible, interpersonal, perceptual and analytical enough and stated that petitioner did not make enough decisions. (Doc. 78, p. 78) The only specific criticism that Mr. Thiery was able level at petitioner was that he had failed to design a gauge for the line. However, Mr. Thiery later admitted that on the date of the trial of this case (some two or three years later) that gauge had still not been made. (Doc. 78, p. 83)

Mr. Thiery's criticisms were not shared by petitioner's immediate supervisor, Mr. Wayne O. Hatch, who had evaluated petitioner on February 6, 1981, shortly after his entry

on to the PAR line, and rendered a "good" opinion of petitioner's work. (Doc. 79, p. 31-33) Additionally, on November 25, 1981, approximately one and one-half years after petitioner's demotion and approximately one year after petitioner had arrived on the PAR line as a technician, Mr. Hatch indicated that petitioner's work was "satisfactory" and that he was doing a "good" job. (Doc. 77, p. 89)

The business reason advanced by the defendant in this case was that petitioner was laid off because his job was eliminated in November of 1982. (Doc. 80, p. 9, Doc. 77, p. 67-71, Doc. 78, p. 127) Petitioner's last day of work was November 19, 1982. (Doc. 77, p. 67) At that time the entire plant took a vacation and when the production line started up again on December 6, 1982, a 42 year old woman, Jo Ann Miller, was on the line in petitioner's position. (Doc 78, p. 90-91) Mr. Manual Shewmaker,

another PAR line technician who worked with petitioner, testified that the job was never eliminated. (Doc. 79, p. 110) Jo Ann Miller, herself, testified that the job could not be eliminated if the line was to continue to run. (Doc. 79, p. 80)

Petitioner's replacement, was a technician with a high school education. (Doc. 78, p. 128) When she started on the line she was doing exactly the same job that petitioner had been doing when his job was "eliminated." (Doc. 78, p. 128)

Approximately five (5) months before the trial of this case, June 17, 1984, the defendant placed an advertisement in the Lexington, Kentucky newspaper seeking applications for the position of "Senior Industrial Engineer". (Doc. 78, p. 122-124) Petitioner, a graduate Engineer, applied for the position. (Doc. 78, p. 126) The defendant did not respond to petitioner's letter of application. (Doc. 78, p. 126)

The position advertised for had not been filled on the date of the trial of this case, December 12, 1984. (Doc. 78, p. 124)

The defendant's personnel manager, Ms. Nancy Skiba, testified that petitioner could not have been hired for this position because he did not have the necessary time study (MTM) certification or experience. She testified that it takes two years of schooling to get MTM certification. (Doc. 78, p. 131) Another of defendant's witnesses, however, on cross-examination, admitted that the MTM training courses are given at the plant and that it takes somewhere between two weeks and two months to complete that training. (Doc. 79, p. 50)

Petitioner, a qualified statistician, introduced a chart into evidence which showed the decline in the average age in the NPD Department, the department from which he was demoted in 1980. (Doc. 77, p. 82)

Petitioner further testified that he had done a statistical study of the lay-offs, demotions, firings and other dislocation of management and professional employees at the defendant's plant in Winchester. Petitioner then rendered his own lay opinion that, based on this statisticial study, age was a factor in his lay-off. (Doc 77, p. 70)

The trial judge excluded certain statements made by management personnel who were in supervisory positions to the petitioner. This evidence was put in the record in this case by an avowal.

Mr. Manual Shewmaker testified that Mr. Arnold Westlund, the head of engineering and a line supervisor of the petitioner, had stated "surely you must have noticed the young people taking over up front." (Doc. 79, p. 125 and Doc. 79, p. 96-97-101)

Mr. George Baylog, petitioner's immediate supervisor in the NPD Department,

also testified by way of avowal. He testified that Mr. Ron Ayott, the plant manager at that time, said to him that he (Baylog) was one of the younger people in the company. This statement was made, according to Mr. Baylog, by Mr. Ayott in the context of a pattern of discrimination within the plant. (Doc. 79, p. 128)

Mr. Shewmaker also attempted to testify that from his observation petitioner's discharge fell into a pattern. (Doc. 79, p. 104) He stated that the plant management was riding petitioner heavily. (Doc. 79, p. 109) All of this evidence was excluded by the trial judge.

Evidence at the trial also showed that defendant's operations are not confined to its small plant at Winchester, Kentucky. Defendant had approximately 50 to 60 operating plants and laboratories in approximately 13 countries in the world. (Doc. 79. p. 158) In addition, the

defendant has other divisions than the lighting division with plants all over the world. (Doc. 79, p. 158) At no time was petitioner offered any other position with the defendant. He was simply discarded by this defendant at age 56.

THE RULINGS BELOW

Following a four day jury trial, the jury rendered its verdict that age was a factor in defendant's decision to lay-off petitioner and the jury made a further separate finding that the actions of the defendant were willful.

The defendant made a Motion for a Judgment NOV which was granted by the District Judge. The District Judge filed a Memorandum Opinion and Order on April 5, 1985. The District Judge in his opinion reviewed each element of proof presented by petitioner and stated, as to each circumstantial piece of evidence, that that particular piece of evidence did not show

pretext. (Doc. 59, p. 10-16) The District Judge stated "the petitioner has adduced no evidence, direct or circumstantial, that Miller's transfer to the production technician position had anything to do with petitioner's age". (Doc. 59, p. 13) The District Judge stated further, "in reality, the statistics presented at trial by the defendant showed that age was not a factor in the company's lay-off procedures..." (Doc. 59, p. 14) The court stated specifically that "these shrinkage figures in no aspect established a pretext on the part of the defendant." (Doc. 59, p. 15) The court went on to state that petitioner was required "to show that the articulated reasons were a pretext for age discrimination, rather than a pretext for arbitrariness. As noted by other courts, the pretext must be for discrimination, not a pretext for some other unreasonable factor 'such as a personality conflict or

unreasonable high, but evenly applied standards of performance.'" (Doc. 59, p. 17) The District Judge then stated his opinion that "the record is simply devoid of any indication that discriminatory animus on the basis of age was a determining factor in Sylvania's decision to lay-off the petitioner." (Doc. 59, p. 18)

The Court of Appeals agreed with the District Judge. The Court of Appeals stated: "The petitioner may prevail if he establishes that 'but for' a discriminatory motive, the action would not have been taken." Page 5 The Court of Appeals stated: "Chappell offered no probative evidence suggesting that Miller was placed in the Production Technician's position because of the desire to replace him because of his age." Page 8 The Court of Appeals concluded, "the record in this case is devoid of evidence permitting an inference

that age was a determining factor in Chappell's lay-off".... "The jury must be able to find by a preponderance of the evidence that age discrimination was a determining factor in the employer's decision". Pages 10-11

REASONS FOR GRANTING THE WRIT

Certiorari Should be Granted to Resolve Conflicts Among the Lower Courts in Applying the Standard Set Forth by this Court.

Petitioner urges this Court to focus in on the methods of proof set forth in Texas Dept. of Community Affairs vs. Burdine, 450 US 248, 67 L.Ed 2d 207, 101 S. Ct. 1089 (1981) This court said:

> "The petitioner retains the burden of persuasion. She must now have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has

> been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 US at 804-805, 36 L.Ed 2d 668, 93 S. Ct. 817." (emphasis added)

In this case, both the District Court and the Court of Appeals conceded that the petitioner had met his burden of producing a prima facia case and entered the fray armed with the presumptions created thereby. Specifically, petitioner went to the jury with the burden, under Burdine, of only showing that the employer's stated business reason was "unworthy of credence." However, both the District Court and the Court of Appeals have added a new and additional element to Burdine. This additional element is boldly illustrated in the dissent of Judge Adams in Lewis vs. University of Pittsburgh, 725 F.2d 925 (CA 3, 1983). Judge Adams stated:

"....the judge repeatedly linked proof of 'pretext' with proof that the actual reasons were 'racially discriminatory.' In so doing, he mistakenly incorporated a requirement for direct proof into the indirect approach. Ms. Lewis was not permitted to succeed simply by showing that the University's reasons were unworthy of credence. Rather the instructions of the court required her to show that the reasons were unworthy of belief because the real reasons were discriminatory.

This collapsing of the indirect and direct branches of proof defeats the purpose of the McDonnell Douglas test. The test's three-step minuet of shifting burdens of production is, as Justice Rehnquist explained in Furnco Construction, an orderly means of evaluating evidence in light of a presumption that 'otherwise unexplained' actions disadvantaging minorities are 'more than likely not' the product of 'an impermissible consideration such as race.' 438 US at 577, 98 S. Ct. at 2949.

If at the third step of the McDonnell Douglas test the plaintiff is required to prove directly that discriminatory reasons motivated the employer, then the plaintiff is denied the all-important Furnco persumption of impermissible motive; the McDonnell Douglas test is thereby reduced to an empty ritual. There

> is no reason for the parties to trudge through the three-steps of the test if, at the third step, the plaintiff is forced to prove directly the ultimate issue of the case." (Emphasis Added)

A comparsion between the majority opinion in Lewis and Judge Adams' dissent in that case clearly illustrates the issue presented by petitioner to this court.

The Third Circuit itself is divided on the application of Burdine. In Duffy vs.Wheeling Pittsburgh Steel Corporation, 738 F.2d 1393 (CA 3,1984) the majority stated:

> "Wheeling-Pittsburgh argues that the District Court made an error of law by focusing on 'pretext' and relieving Duffy from having to prove an actual discriminatory intent. However, under the McDonnell Douglas test, a showing that a proper justification is pretextual is itself equivalent to a finding that the employer intentionally discriminated."

The Sixth Circuit's approach is aptly illustrated by Wilkins v. Eaton Corporation, 790 F.2d 523 (CA 6 1986) wherein the majority said:

> "there must be evidence of discriminatory purpose, Ackerman, 670 F.2d at 70, and there must be evidence from which a reasonable jury could conclude that age was the more likely reason for Wilkins' discharge rather than merely a speculative possibility"

The Ninth Circuit has indicated its position that it is not necessary for a claimant to prove a connection between the discriminatory act and a failure to be promoted. The Ninth Circuit said in League, etc. vs. The City of Salinas Fire Department, 654 F.2d 558 (CA 9th 1981)

> "The department contends that the district court committed reversible error when it awarded retroactive promotion without first finding that the Department's discriminatory acts actually caused Padilla's failure to be promoted. The district court made no finding on this point. In Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976), the D.C. Circuit held that refusal to make such a finding requires remand for an appropriate finding. Id at 1085 However, we have never decided whether a finding is required, and need not do so here.

Petitioner's position then can be simply stated. Under Burdine once the

petitioner has established his prima facie case he goes into the arena armed with certain presumptions that require no further proof on his part. Specifically, if the petitioner succeeds in proving by circumstantial and inferential means that the employer is not telling the truth when the employer states its business reason, the presumptions already afforded the petitioner make it unnecessary for the petitioner to introduce evidence on the two remaining issues i.e. discriminatory intent and causation. In other words, if the concept of the prima facie case is to have any real meaning, the requirement of further direct evidence on the part of the petitioner should be unnecessary once the credibility of the employer's business reason is destroyed.

Because of the very nature of discrimination cases including the fact that the employer possesses most of the

information and that the claimant is, in effect, required to prove a state of mind on the part of the employer, the situation presented in this case will exist in the vast majority of all discrimination cases. For this reason, the issue petitioner brings to this court is critically important to the development of discrimination law.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

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CERTIFICATE OF SERVICE

I, Edward S. Monohan, a member of the Bar of The Supreme Court of the United States and Counsel of Record for Ian C. Chappell, petitioner herein, hereby certify that three copies of the foregoing petition were mailed, United States 1st class mail, postage prepaid, on this 5th day of January, 1987, to Robert F. Houlihan, Esq. Stoll, Keenon & Park, 1000 First Security Plaza, Lexington, Ky., 40502; Karen P. Ross, Esq., David M. Eisenburg, Esq., John P. McKeefe, Esq., GTE Products Services Corporation, One Stanford Forum, Stamford, CT., 06904, Attorneys for Respondent.

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APPENDICES

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-5333

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IAN C. CHAPPELL,
Plaintiff-Appellant.

v.

GTE PRODUCTS CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed October 14, 1986

Before: MERRITT and JONES, Circuit Judges; and THOMAS, Senior District Judge.*

JONES, Circuit Judge. Plaintiff Ian Chappell appeals from the district court's order granting the defendant GTE Products Corporation's motion for judgment notwithstanding the verdict in this action alleging a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1982). The jury had returned a verdict finding that GTE had discriminated on the basis of age when it laid off Chappell. We affirm the district court's order granting GTE's motion.

*The Honorable William K. Thomas, Senior Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Chappell was 56 years old at the time of his layoff from GTE's U.S. Lighting Division (Sylvania). Sylvania manufactures industrial and commercial lighting at the GTE plant in Winchester, Kentucky. The Winchester plant is part of a worldwide operation with 50 to 60 operating plants and laboratories in about 13 countries. From 1979-80, net income from the Winchester plant fell by over 40%, and in July 1980 Sylvania began to implement a major reduction in its salaried personnel. As a result, four layoffs occurred between July 1980 and November 1982.

With the exception of two brief periods, Chappell had worked for Sylvania as a design engineer since 1952. In 1969 Chappell began working at the Winchester plant as a Senior Engineer "A" in the New Product Development Department (NPD) where he stayed until 1980. In 1980, Chappell's position of Senior Engineer was eliminated as part of the first major reduction in salaried personnel. Chappell was transferred to the position of Production Technician. Two incumbent technicians were laid off at that time. Chappell's salary was maintained at Grade 6 level (Senior Engineer) although production technicians were ordinarily paid at Grade 4 level. As a production technician, Chappell worked for four months in the dichroic coating room until he was transferred to the Parabolic Aluminized Reflector (PAR) factory engineering section. He worked there as one of two technicians responsible for the technical and quality control of all PAR functions.

In 1981 Sylvania's Winchester plant suffered a loss of $2.6 million, or 20% of its net income. The company implemented two additional 5% reductions in salaried personnel, neither of which affected Chappell. In November 1982 Sylvania mandated a further 10% reduction in the Winchester plant's salaried work force. Each department head was instructed to eliminate those positions that would least impact the department's operations. In the Production Department, the positions of one Production Technician, one Specification Clerk, and one Project Engineer were designated for elimination.

The three Production Technicians were similar in several respects. Each was a member of the ADEA protected age group (40-70): Chappell was 56, Manuel Shewmaker was 54, and William Berry was 47. In addition, each was a long-time Sylvania employee with nearly 25 years of work experience. In performance appraisals, however, the three technicians had been rated differently. There were five different ratings an employee could receive: "excellent," "commendable," fully satisfactory," "provisional," and "unsatisfactory." Berry's performance rating ranged from "commendable" to "fully satisfactory;" Shewmaker's rating was consistently "fully satisfactory;" Chappell's rating ranged from "average-good" to "unsatisfactory." Chappell was the Production Technician selected for layoff at this time. The other Production Department employees laid off were outside the protected age group: a Project Engineer aged 32 and a Specification Clerk aged 34. Chappell was officially laid off on November 19, 1982.

The plant closed down for two weeks following the final layoff. According to the GTE supervisor's testimony, a decision was made during this two week hiatus to eliminate the position of Production Supervisor in the Relight and Packing Department. That position was being held by Jo Ann Miller, who was 41 years of age and had been employed by Sylvania for eighteen years. Miller had an excellent performance record and was one of the few female supervisors in the plant. Because the layoff objectives had already been achieved, GTE transferred Miller to the Production Technician position previously held by Chappell out of its desire to retain a consistently fine employee and the need to satisfy affirmative action responsibilities.

Chappell filed suit in the district court alleging that his layoff and the subsequent transfer of Miller to his former position was a violation of the ADEA. The jury returned a verdict for Chappell finding that GTE discriminated on the basis of age when Chappell was laid off. The district court granted

GTE's motion for judgment notwithstanding the verdict, concluding that the record was devoid of any evidence that age was a determining factor in GTE's decision to lay Chappell off. Moreover, the court concluded that there was no evidence that age had anything to do with Miller's transfer to the position of Production Technician.

A judgment notwithstanding the verdict is a question of law that is freely reviewable on appeal. The issue raised by a j.n.o.v. is whether there was sufficient evidence to raise a question of fact for the jury. *O' Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). The legal standard is the same in both the trial court and the court of appeals. In determining whether the evidence was sufficient, the court may neither weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. Instead, the evidence must be viewed in the light most favorable to the party against whom the motion was made, drawing from that evidence all reasonable inferences in his favor. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). Although the fundamental principle is that there must be a minimum of interference with the jury, the federal courts do not follow the rule that a scintilla of evidence is enough. *A. B. Small Co. v. Lamborn & Co.*, 267 U.S. 248, 254 (1925). If the court finds that the evidence points so strongly in favor off the movant that reasonable minds could not come to a different conclusion, then the judgment n.o.v. should be upheld. *Reeves v. Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973).

Jury control devices such as judgment n.o.v. or directed verdict have been recognized by courts as applicable in certain age discrimination cases due to the possibility that sympathy for the plaintiff may present an overriding but impermissible factor in a jury verdict for plaintiff. *See Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C.

Cir.), *cert. denied*, 464 U.S. 994 (1983); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982). "[T]he question for the jury was not whether plaintiff was treated fairly but whether discrimination occurred." *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1117 (6th Cir. 1980).

The evidentiary guidelines governing proof in discrimination cases were first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (construing Title VII), and the same analysis is generally applied in ADEA cases. *Coburn*, 711 F.2d at 342. A three-step judicial procedure allocates the shifting burdens of production of evidence by the parties. "[T]he burden of production rests first on the plaintiff to establish his *prima facie* case, then on the defendant 'to articulate some legitimate nondiscriminatory reason for the employee's rejection,' and finally again on the plaintiff to show that the defendant's reasons were pretextual." *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1164 (8th Cir. 1985) (quoting *McDonnell Douglas*, 411 U.S. at 804). Although the burden of production shifts, the burden of persuasion remains at all times with the plaintiff. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

In cases brought under the ADEA, a plaintiff has the ultimate burden of proving that age was a determining factor in the employer's decision in order to establish liability. *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983). When there is more than one reason advanced for an employer's decision, the plaintiff may prevail if he establishes that "but for" a discriminatory motive, the action would not have been taken. *Wilkins v. Eaton Corp.*, 790 F.2d 515, 520 (6th Cir. 1986).

To make out a *prima facie* case, the plaintiff must show that he was in the protected age group (40-70), that he was discharged, that he was qualified for the position and that he was replaced by a younger person. *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982); *Wilkins*, 790 F.2d at 520. The third element may be replaced with

a showing "that he was doing his job well enough to meet his employer's legitimate expectations." *See La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). In a reduction in force situation where the ADEA plaintiff's position is eliminated and not refilled, the *prima facie* burden is somewhat heavier. *LaGrant v. Gulf & Western Manufacturing Co.*, 748 F.2d 1087, 1090-91 (6th Cir. 1984). In the instant case, the district court ruled that Chappell had met his burden of persuasion in establishing a *prima facie* case of discrimination. We agree that Chappell met this burden so we need not discuss the *prima facie* question here.

Once the court has found that the plaintiff has established a *prima facie* case, the burden of production shifts to the defendant to produce admissible evidence of a nondiscriminatory reason for the challenged action. The defendant "need not persuade the [trier of fact] that it was actually motivated by the proffered reasons," *Burdine*, 450 U.S. at 254, but "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Id.* at 257. The district court found that Sylvania had met its burden of production in establishing legitimate business reasons for Chappell's layoff and the evidence supports this finding. The parties do not dispute that Sylvania was facing severe financial setbacks at its Winchester plant, having gone from a $4.6 million profit in 1979 to a $2.6 million loss in 1982. This economic situation reasonably resulted in a series of layoffs to reduce the salaried work force at Winchester. Sylvania adduced evidence that a decision was made to reduce the number of technicians on the PAR lines, that Chappell had the lowest personnel evaluation of the three PAR technicians, and that Chappell's position was eliminated at that time.

Once Sylvania articulated legitimate, nondiscriminatory reasons for its selection of Chappell for layoff, the burden shifted to Chappell to prove by a preponderance of the evi-

dence that those reasons were a pretext for intentional age discrimination. *Davis v. Combustion Engineering Inc.*, 742 F.2d 916, 921 (6th Cir. 1984). Three ways in which a plaintiff can establish that defendant's reasons for laying off the plaintiff were not credible are: (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showng that they were not the actual factors motivating the discharge, or (3) if they were factors, by showing that they were jointly insufficient to motivate the discharge. *La Montagne*, 750 F.2d at 1414-15. The factfinder may not, however, focus of the soundness of an employer's business judgment. *Wilkins*, 790 F.2d at 521.

Often, plaintiffs have a difficult task in meeting their burden of persuasion in ADEA cases, although they have only to show that age was "a," and not "the," determining factor in the employer's personnel decision. *Cuddy v. Carmen*, 694 F.2d 853, 859 (D.C. Cir. 1982), *cert. denied*, 106 S. Ct. 597 (1985). Typically, they must rely on such circumstantial evidence as differential treatment, inconsistent records or statistical evidence of discrimination in order to establish the necessary inferences. *See id.* (quoting B. Schlei & P. Grossman, *Employment Discrimination Law* 1153-55 (1976)).

In this case, Chappell argues the following points to support his claim that Sylvania's articulated reasons were pretextual:[1] (1) the fact that Sylvania later transferred Jo Ann Miller, also an employee within the protected age group, from

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[1]Chappell also argues two other points to support his claim. Neither of the arguments raises an inference of age discrimination. First, he offered evidence that the shrinkage figures for the PAR Department increased when he first began working there and declined after he was laid off. The record shows, however, that the shrinkage rates reflected the efforts of three shifts, 150 employees and the introduction of mechanical and product innovations. The declining figures do not show that his performance alone affected the production of the department.

Second, Chappell argues that the defendant's failure to respond to his June 1984 application for the advertised position of Senior Industrial Engineer raised an inference of age discrimination. Chappell did not, however, meet the basic qualifications for the position. Minimum qualifications were a bachelor of science degree in Industrial Engineering and additional work certification, neither of which Chappell had. Moreover, that position had not been filled at the time of trial.

a Production Supervisor position to the job of Production Technician, and (2) statistics obtained and tabulated by the plaintiff himself relating to demotions at the Winchester plant. We will address each of these contentions in turn.

(1) *Transfer of Jo Ann Miller*

Sylvania's supervisors testified that the Winchester plant management decided to reorganize the packing aspect of line operations in an effort to improve efficiency. As part of this action, the packing department was disbanded and the position of Production Supervisor held by Miller was eliminated. Miller, an 18-year employee with excellent performance appraisals, was given the option of being laid off or taking the job as Production Technician. That decision was made after GTE had already laid off the quota necessary to meet the ten per cent reduction.

The isolated fact that a younger person eventually replaces an older employee is not enough to permit a rebuttal inference that the replacement was motivated by age discrimination. *La Montagne*, 750 F.2d at 1413. Chappell offered no probative evidence suggesting that Miller was placed in the Production Technician's position because of a desire to replace him because of his age. There is not even a slight inference raised that the layoffs and Miller's transfer were anything but sound business decisions. Chappell was laid off from the production department as were two younger employees from that department. No evidence was offered that Sylvania was not required to reduce its work force by ten per cent, nor was any offered disputing the manner in which those cuts would take place. Sylvania did not eliminate the Production Technician's position because the work performed in that position was not necessary, it eliminated that position because the loss of that work would have the least impact on the department's operations. Simply because Sylvania decided after the layoffs that a position would have to be made in order to retain a valuable employee—who also

happened to be a member of the protected age category and a woman—and that position fortuitously happended to have previously been held by an older employee, does not necessarily raise an inference of age discrimination.

One case factually similar to this case is *Coburn v. Pan American World Airways, supra.* The plaintiff in that case was laid off from his position of reservations supervisor because of a reduction in force caused by the defendant's dire financial situation. Management was required to lay off the least productive employee in a designated peer group. Plaintiff was ranked lowest in his peer group and terminated. Even though plaintiff disputed his rating and the composition of his peer group, the court found that the promotion of two younger females after the defendant and another airline merged did not indicate that age discrimination played a part in his discharge. For those reasons, the District of Columbia Circuit affirmed the district court's order granting the defendant's motion for judgment notwithstanding the verdict.

A company in severe financial straits may face difficult and painstaking choices in deciding which employees must be laid off to help curtail operating expenses. Often business decisions may force the company to eliminate jobs held by members in a protected category. When those situations arise, a plaintiff alleging that he was laid off for discriminatory reasons necessarily has a more difficult time proving his case. The record in this case does not reveal that Miller's transfer to the Production Technician's position was not based on legitimate business concerns. It may very well be that there is a question as to whether Chappell was in fact a better performer than the two Production Technicians not discharged. But that would not raise an inference of age discrimination when both of the men retained were also in the protected age category, and two younger men in the same department were discharged.

(2) *Statistical Evidence Offered by Chappell*

At trial, Chappell offered "demotion statistics" as evidence of a decrease in the average employee age at the Winchester

plant. He claimed to have obtained his statistics from "general observation" and the "environment" (attendance at birthday parties and newspaper notices). In his definition of "demotion," he included anyone who had left the Winchester plant for any reason, even to take a better paying job. He also offered statistical evidence that the average age of employees in the New Product Development Department declined between 1978 and 1984. The district court found that Chappell's statistical evidence was "mere conjecture" and "personal belief." We agree with the district court that the statistics offered by Chappell carry no weight. If he wanted to introduce true statistical evidence, he could have obtained the company records during the course of discovery. Mere personal beliefs, conjecture and speculation are insufficient to support an inference of age discrimination. *See Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

Sylvania's statistical evidence, on the other hand, showed that only 27%, or 3 of the 11 employees laid off on November 19, 1982, were members of the protected age group (40-70), at a time when that group made up 59% of the salaried work force. Over the period of the four layoffs, the under-40 work force fell from 52% to 37%, while the age-protected work force increased from 48% to 63%. The relevant statistics offered in this case do not aid Chappell's contention that a supportable inference of age discrimination was established.

The record in this case is devoid of evidence permitting an inference that age was a determining factor in Chappell's layoff. Rather, the record shows that Chappell was laid off for sound and legitimate business reasons. Even if one could conclude from a very liberal reading of the record that a scintilla of evidence of age discrimination was found, that would nonetheless be insufficient to support a jury verdict. The jury must be able to find by a preponderance of the evidence that

age discrimination was a determining factor in the employer's decision.[2]

Based on the record in this case, the district court's order granting the defendant's motion for judgment notwithstanding the verdict is **AFFIRMED.**

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[2]Chappell also contends that the district court erred in excluding evidence of purported age biased statements allegedly made out of court by Sylvania's agents. One of the statements allegedly made by a supervisor to Manual Shewmaker was "surely you must have noticed the young people taking over up front." The other statement was made in a dialogue between a former employee and former supervisor. The employee allegedly stated, "we old timers know the procedure as to how things operate within the company." The supervisor's response was "Don't categorize me in that with you." The district court ruled that the statements were prejudicial, and Chappell did not prove that Sylvania's agents had specific authority to make the statements. We agree. Such comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination. *See Haskell v. Kaman Corp.*, 743 F.2d 113, 120 (2d Cir. 1984).

APPENDIX B
1B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 83-185

IAN C. CHAPPELL PLAINTIFF

VS.

GTE PRODUCTS CORPORATION DEFENDANT

MEMORANDUM OPINION AND ORDER

The above-styled action is presently before the Court following defendant's motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 59(b) to set aside the jury verdict and judgment entered in this case on December 17 and 18, 1984, and to enter judgment in accordance with the motion for directed verdict made by the defendant at the close of all the evidence. In the alternative, the defendant has moved for a new trial. Defendant's two major arguments for its judgment n.o.v. motion are as follows: (1) there was no evidence adduced at trial that age was a determining factor in plaintiff's layoff,

and (2) there was no evidence from which a reasonable juror could conclude that the defendant willfully discriminated against plaintiff, with age a determinative factor, when it selected plaintiff for layoff.

The standard for granting a judgment n.o.v. is the same as that applied when deciding a motion for a directed verdict Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973). Viewing the evidence in a light most favorable to the plaintiff, the Court must decide whether the evidence points so strongly in favor of the movant that reasonable minds could not come to a different conclusion. Morelock v. NCR Corp., 586 F.2d 1096, 1104-5 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979). Courts have recognized the applicability of jury control devices such as judgment n.o.v. or directed verdict in some ADEA cases because of the possibility that sympathy for the plaintiff could present an overriding

but impermissible factor in a jury verdict for plaintiff. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242 (4th Cir. 1982); Coburn v. Pan American World Airways, Inc., 32 FEP Cases (BNA) 731 (D.D.C. 1982), aff'd. 711 F.2d 339 (D.C. Cir. 1983), cert. denied, ____U.S.____, 104 S.Ct. 488 (1983).

The district court in Coburn discussed the difficulties a jury in an ADEA case can have in distinguishing between perceived "fairness" to a long-serving employee and age discrimination. The court stated:

> Neither the Court nor the jury may find for the plaintiff in order to reward past services to defendant or because of some general feeling that plaintiff deserved better from his longstanding employer. "[T]he question for the jury was not whether plaintiff was treated fairly but whether discrimination occurred." Sahadi v. Reynolds Chemical, 636 F.2d 1116, 1117, 23 FEP Cases 1338 (6th Cir. 1980).

32 FED Cases at 735.

In affirming the district court's granting of the defendant's motion for judgment n.o.v., the Court of Appeals for the District of Columbia stated:

> The ADEA protects employees only against unlawful age discrimination. Coburn draws a compelling picture of a longtime loyal employee who may have been treated less than fairly. But the record is devoid of any evidence that age was a "determining factor" in Pan Am's decision to terminate him. Coburn failed to carry his burden of proving discriminatory motive by a preponderance of the evidence and for a jury to find in his favor it would have to indulge in an impermissible speculation. The trial court properly granted judgment n.o.v. on Coburn's ADEA claim. [citations omitted].

711 F.2d at 345.

In order for this Court to decide the defendant's motion for judgment n.o.v., it must test the evidence presented at trial in light of the legal standards established for ADEA actions. Plaintiff asserts that the defendant violated the Age Discrimination in Employment Act of 1967 when he was laid off from this job at Sylvania's Winchester,

Kentucky, plant in November 1982. For the plaintiff to prevail on his claim, he must prove the following elements: (1) that he was covered by the Act, (2) that he had suffered an unfavorable employment action by an employer covered by the Act, and (3) that he was laid off under circumstances in which the employee's age was a determining factor in the action in the sense that "but for" his employer's motive to discriminate against him because of age, he would not have suffered the action. Lovelace v. Sherwin-Williams, 681 F.2d 230, 238 (4th Cir. 1982); Loeb v. Textrom, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979).

Thus, plaintiff must first produce evidence which establishes a prima facie case of discrimination as generally outlined in the United States Supreme Court decision of Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To make out a prima facie case, the plaintiff

must adduce evidence: (1) that he was in the protected age group, (2) that he held a job for which he was qualified, (3) that an adverse job action was taken, and (4) that the job remained open and applicants for it were sought. Id. at 253. In the case at bar, the Court, in viewing the evidence in a light most favorable to the plaintiff, ruled that the plaintiff had met his burden of production in establishing a prima facie case of discrimination.

Once the Court has found that the plaintiff has made out a prima facie case, the burden of production shifts to the defendant to produce admissible evidence of a nondiscriminatory reason for the personnel action complained of. Even though the prima facie showing may have been enough to shift the burden of production to the defendant, it is not necessarily enough to entitle the plaintiff to submit his case to the jury. Askin v. Firestone Tire & Rubber Co., 600

F.Supp. 751, 755 (E.D.Ky.1985). Even though the plaintiff has shifted the burden of production to the defendant, the plaintiff continues to carry the burden of persuasion throughout the entire trial. The issue is whether age was a determining factor in the layoff of the plaintiff (prima facie persuasion.)

Id. at 755-56.

Once the defendant offers admissible evidence of a non-discriminatory reason for the adverse action, the plaintiff, in order to prevail, must introduce further evidence to demonstrate that the defendant's reason is a pretext for discrimination based on age. Upon motion for directed verdict, the Court must re-evaluate all the evidence and determine if the plaintiff has satisfied his burden of persuasion by a preponderance of the evidence. In doing so, the Court must consider the evidence the plaintiff offered

earlier in establishing his prima facie case of production. See Burdine, at 248, Askin at 755-56.

In the case at bar, the Court ruled that the plaintiff had met his prima facie burden of production, so that the burden of production shifted to the defendant to show by admissible evidence a nondiscriminatory reason for the layoff of the plaintiff. Once the defendant established its nondiscriminatory reasons for laying off the plaintiff, the burden of production shifted back to the plaintiff to show that these reasons were merely pretext to obscure the discriminatory action. Askin at 755-56. After re-evaluating all the evidence presented at this trial, this Court is of the opinion that the plaintiff did not meet his burden of persuasion on the issue of whether age was a determining factor in the layoff of the plaintiff. The evidence produced at trial points so strongly in

favor of the defendant that reasonable minds could not differ in the conclusion that the defendant did not violate the plaintiff's rights under ADEA. Therefore, defendant's motion for a judgment n.o.v. must be granted.

As discussed above, the Court ruled at trial that the plaintiff had made out a prima facie case so as to shift the burden of production to the defendant to demonstrate a legitimate non-age reason for the layoff. Certain critical facts in this case were adduced at trial which are not in dispute and can be summarized as follows: Sylvania was facing severe financial circumstances, having gone from 4.6 million to a loss of 2.6 million over a period of three years. (1979-1982). These economic conditions resulted in a series of four layoffs over the period of July 1980 to November 1982. The plaintiff was not laid off in the first three layoffs (July 1980,

February 1981 and November 1981), but he was laid off in the November 19, 1982, layoff.

This Court is of the opinion that the defendant met its burden of production of establishing a legitimate nondiscriminatory reason for the layoff of the plaintiff. The statistical evidence adduced at trial shows that throughout these layoffs, the population of salaried employees under age 40 declined from 52% to 37%. In contrast, the age-protected workforce increased from 48% to 63%. The statistical evidence also establishes that employees under 40 were affected by the layoffs in severe disproportion to their representation in the workforce and the opposite was true for the employees in the protected age group.

In November 1982, Sylvania's Winchester plant was required to reduce its workforce by 10%, which meant a reduction of three employees in the factory engineering department. Manufacturing manager Ward

Powers, utilizing a fair and nondiscriminatory criteria in his analysis of employees for layoff, instructed each department head to eliminate those positions that would least impact their operations.

After completing a functional analysis of his departmental needs, factory engineering manager Arnold E. Westlund, Jr. determined that eliminating a specification clerk, a project engineer, and a production technician would have the least impact on his department's operations. Since each of the production technicians had approximately 25 years of service with Sylvania, Westlund and his supervisors reviewed the job performance and analyzed the performance appraisals of the plaintiff, age 56, and the other production technicians, Manual Shewmaker, age 54, and William Berry, age 47. Westlund's review of the performance appraisal revealed that the plaintiff clearly had the poorest ratings of the

three. William Berry's performance appraisals ranged from fully satisfactory to high competent. Manual Shewmaker's performance appraisals were both fully satisfactory. The plaintiff's performance appraisals as a production technician rated only average-good and unsatisfactory. Based upon this criteria, Sylvania laid off the plaintiff on November 19, 1982. In addition, Sylvania laid off a project engineer, age 32, and a specification clerk, age 34.

It is quite clear to the Court that Sylvania, in light of the difficult economic times it was experiencing, simply made a business judgment as to which employees it would have to lay off, and Ian Chappell was one of those impacted by the company's decision. The United States Court of Appeals for the Sixth Circuit, in the case of Morelock v. NCR Corp., 586 F.2d 1106 (6th Cir. 1978) held that job performance, i.e.

skill and ability, is a criterion other than age which is a reasonable and proper means of selection of employees for layoff. It is well established that a jury may not examine an employer's reasons for selecting employees for layoff and decide that the company's business judgment and policies "do not appeal to the group's sensibilities and notions of what is proper." Stacey v. Allied Stores Corp., 581 F.Supp. 1103, 1109, (D.D.C. 1984). The fairness of wisdom of management's policies or decisions are not elements which the jury may consider in an age discrimination case. Although a juror may feel a plaintiff was not treated with complete fairness, this is not the ADEA standard against which his employer's conduct is measured. Trainer v. Philadelphia Nat'l. Bank, 541 F.Supp. 195 (E.D. Pa. 1982), aff'd, without opinion, 707 F.2d 1395 (3rd Cir. 1983).

Once Sylvania proffered an articulate lawful reason for the layoff of the plaintiff, the burden of production shifted back to the plaintiff to prove that the proferred reasons were a pretext, by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation was unworthy of credence. See Burdine at 253-56. After a careful review of the record, this Court is of the opinion that there was not substantial evidence presented at trial to support a jury finding of pretext on the part of the defendant.

The plaintiff can establish that Sylvania's reasons for laying off the plaintiff were unworthy of credence in any of three ways: (1) by showing that Sylvania's reasons have no basis in fact, (2) if they have a basis in fact, by showing that they were not really factors motivating the discharge, or (3) if they were factors,

by showing that they were jointly insufficient to motivate the discharge. La Montagne v. American Convenience Products, ___ F.2d ____, no, 83-2493 (7th Cir. 1984), page 11.

In the case are bar, plaintiff attempted to prove pretext by arguing the following four points to support his claim: (1) the fact that Sylvania later transferred Jo Ann Miller, also an employee within the protected age group, from a production supervisor position to the job of production technician, (2) statistics obtained and tabulated by the plaintiff himself relating to demotions at the Winchester plant, (3) overall shrinkage figures combining all three shifts of the entire PAR department to establish plaintiff's personal job qualifications, and (4) Sylvania's advertisement for a senior industrial engineer position. The Court will address each of these points individually to

determine whether the plaintiff established by a preponderance of the evidence that Sylvania's proffered reasons for laying off the plaintiff were merely pretextual.

Plaintiff's first argument that the defendant's reasons were pretextual was the assignment of a younger person, Jo Ann Miller, to the job of production technician after the plaintiff was laid off. Like the plaintiff, Miller was a member of the protected age group and was a victim of the elimination of her position of production supervisor due to the difficult financial hardships encountered by Sylvania. Yet, the evidence also reflects that Jo Ann Miller was an 18-year employee of Sylvania with an excellent performance record.

Because Miller's position of production supervisor was going to be phased out and management had already made its 10% cut in the workforce in November of 1982, Sylvania concluded that it would not be necessary to

lay off Miller if they could find a job for her that was consistent with her background. Mrs. Miller had a broad background in the plant and had consistently maintained good performance levels. In addition, keeping Miller in the workforce was also important to Sylvania's affirmative action responsibilities as a government contractor to provide job opportunities to qualified women. Thus, Miller was given the choice of taking the job of production technician when her supervisor's job was eliminated, or being laid off.

This Court concludes that the tranfer of Jo Ann Miller to the job once held by the plaintiff (production technician) does not establish that the defendant's nondiscriminatory reasons for laying off the plaintiff were pretextual. It is well established that it is not a violation of the ADEA to replace an employee in the protected class with a younger person, as

long as the protected employee is not replaced because of age. LaMontagne v. American Convenience Products, Inc., slip op. at 9; Coburn v. Pan American World Airlines, Inc., 711 F.2d 339 (D.C. Cir. 1983); Massarsky v. General Motors Corp., 706 F.2d 111 (3rd Cir. 1983). As the United States Court of Appeals for the Seventh Circuit states in LaMontagne, "because younger people often succeed to the jobs of older people for perfectly legitimate reasons, the mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement was motivated by age discrimination." Slip op. at 9.

The case at bar is analagous to Coburn v. Pan American World Airways,Inc., 711 F.2d 339 (D.C. Cir. 1983), in which the United States Court of Appeals for the District of Columbia affirmed the district court's granting of a judgment n.o.v. in an

age discrimination case. In Coburn, the plaintiff was employed by Pan Am as a reservation supervisor before he was laid off during a reduction in the force mandated by Pan Am's difficult financial situation. Pan Am implemented its layoff by requiring its managers to select the least productive employee on the basis of abilities, qualifications, productivity and length of service. Plaintiff was rated the least productive worker in his group and was subsequently selected for layoff. Id. at 343.

The court of appeals found that Pan Am had met its burden of production by proffering a legitimate, nondiscriminatory reason for the plaintiff's layoff by establishing that the company was facing serious financial difficulties that necessitated a reduction in its workforce. In addition, Pan Am also showed it had implemented the layoff in a

nondiscriminatory fashion through the use of its performance analysis of each employee. Id. at 343.

While Coburn disputed his rating, he introduced no evidence that age was the reason he was rated so low in his performance analysis. Instead, in an attempt to show an age-based nexus, he relied on the fact that two younger employees working as trainers were later promoted to the reservations supervisor position he had held. The court of appeals concluded that the fact that these trainers were promoted to the job of reservation supervisor "does not indicate an age discriminatory animus on the part of Pan Am." Id. at 344.

It is clear in the case at bar that simply because the younger Jo Ann Miller was transferred from her eliminated products supervisor position to the job of production technician does not establish that the

defendant's reasons for laying off the plaintiff were pretextual. Sylvania was under no obligation to retain or create a new position for the plaintiff. Wilburn v. Southern Galvanizing Co., 34 FEP Cases (BNA) 1468, (D. Md. 1983).

The plaintiff has adduced no evidence, direct or circumstantial, that Miller's transfer to the production technician position had anything to do with the plaintiff's age. The decisions to lay off the plaintiff and to later transfer Miller to the plaintiff's prior position were merely business judgments made by Sylvania. It should be re-emphasized at this juncture that the question before the Court is not whether the company's methods were sound or unsound, or whether the plaintiff's dismissal was an error of business judgment; the question is simply one of age discrimination. Kephart v. Institution of

Gas Technology, 630 F.2d 1217 (7th Cir. 1980). Therefore, this Court is of the opinion that the transfer of Jo Ann Miller to the job of production technician did not render Sylvania's expressed reasons for laying off the plaintiff a mere pretext.

The plaintiff's next contention used to establish a pretext was the alleged demotion statistics compiled by the plaintiff himself. The plaintiff testified at trial that he had tabulated demotion statistics which included the age of individuals (which he claimed to have perceived "from the environment") and the facts surrounding each alleged change in employment status. The plaintiff further testified that his so-called demotion statistics included anyone who left the Winchester plant, no matter under what circumstances. Thus, included in these demotion statistics were people who left the Winchester plan to accept another job with Sylvania at a higher

rate of pay and those who left Sylvania to pursue job opportunities with other companies.

It is obvious to the Court that these statistics provided by the plaintiff are not a true reflection of the people who were actually demoted by Sylvania, and thus they cannot establish that Sylvania's reasons for the plaintiff's layoff are pretextual. Mere personal beliefs, conjecture and unsupported anecdotal testimony are insufficient to support an inference of age discrimination. Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983), reh'g. denied, 721 F.2d 819 (5th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 2658 (1984).

In reality, the statistics presented at trial by the defendant showed that age was not a factor in the company's layoff procedure and that employees in the protected age group were not disparately

impacted by the layoffs. In the layoff at issue, November 1982, only three of the eleven employees impacted (or 27%) were 40-70 years of age, while at the time of this layoff 59% of the workforce was in the protected age group. The true layoff statistics prove that Sylvania did not discriminate against older employees in its selection of which employees would have to be laid off.

Another method by which the plaintiff attempted to show pretext by the defendant was to establish that his job performance was satisfactory and met the standards of the company. The only evidence plaintiff introduced to support his claim that he was performing satisfactorily as a production technician was the shrinkage figures of the PAR. Yet, the evidence revealed that the shrinkage data adduced by the plaintiff did not specifically reflect the performance of any one individual on any one shift.

Instead, the data reflected the overall performance of all PAR manufacturing employees (i.e., operators, mechanics, technicians, engineers and foremen on all three PAR lines) over all three production shifts. In addition, the shrinkage figures presented also reflected the significant impact of specific product and mechanical innovations which helped reduce shrinkage ratings on the PAR lines. It is quite obvious to the Court that the introduction of these shrinkage figures in no aspect established a pretext on the part of the defendant.

The plaintiff's final thrust that the defendant's explanations were pretextual was an assertion that a vacancy had arisen for a senior industrial engineer and that he was not offered the job. Yet, the testimony revealed that the plaintiff lacked the basic qualifications for the job. Plaintiff did not hold a bachelor of science degree in

industrial engineering; he did not possess the requisite MTM work experience; nor did he have MTM certification. In fact, Sylvania never did fill the position. It is well settled that where a plaintiff cannot prove that he was qualified for a job for which the employer was seeking applicants, no ADEA violation has occurred. See Ford v. General Motors Corp., 656 F.2d 117 (5th Cir. 1981); Lee v. National Can Corp., 699 F.2d 932, 937 (7th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 148 (1983).

As the above discussion indicates, the plaintiff has failed to prove by a preponderance of the evidence that the reasons of the defendant were a pretext for intentional age discrimination. Davis v. Combustion Engineering, Inc., 742 F.2d 916, 920-21 (6th Cir. 1984). Because the plaintiff has not met his burden of production of establishing that the defendant's explanations were a mere pretext

for intentional age discrimination, he has failed to meet his ever present burden of ultimate persuasion that age was a determining factor in the defendant's decision to lay off the plaintiff. Locke v. Commerical Union Ins. Co., 676 F.2d 205 (6th Cir. 1982).

It should be emphasized again that once the defendant articulates and supports by admissible evidence the reasons for the adverse personnel action, the burden of production shifts back to the plaintiff to show that the articulated reasons were a pretext for age discrimination, rather than a pretext for arbitrariness. As noted by other courts, the pretext must be for discrimination, not a pretext of some other unreasonable factor "such as a personality conflict or unreasonably high but evenly applied standards of performance." Harker v. Federal Land Bank of Louisville,

679 S.W.2d 226, 231 (Ky. 1984). "The law does not guarantee an employee a reasonable employer, but only affords protection against discrimination." Askin at 757.

In addition to the jury finding that age was a determining factor in the layoff of the plaintiff, the jury also found that the discriminatory layoff was done willfully. It is obvious to the Court that because the plaintiff has failed to establish the basic elements of an ADEA violation at trial, then he has also failed to prove a willful violation. The evidence adduced at trial demonstrates that Sylvania utilized legitimate, nondiscriminatory criteria in selecting the plaintiff for the layoff. Based on the evidence presented at trial, it is extremely difficult to understand how the jury could find a willful violation of ADEA. This would be true if the jury applied either the Transworld Airlines, Inc. v. Thuston, ___ U.S. ___,

53 U.S.L.W. 4024, 4028 (Jan. 8, 1985) test for willfulness of "reckless disregard" or the Sixth Circuit's "knowing, intentional and deliberate" standard found in Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1184 (6th Cir. 1983).

In light of the authority applicable to ADEA cases and motions for judgment n.o.v., this Court is of the opinion that the record is simply devoid of any indication that discriminatory animus on the basis of age was a determining factor in Sylvania's decision to lay off the plaintiff. Juries in ADEA cases can sometimes be misled by sympathy for long-service employees and may speculate as to the employer's reasons for layoffs and replacements. Such jury speculation and sympathy for plaintiffs are the very evils directed verdicts and judgments notwithstanding the verdict are designed to guard against. After viewing all the evidence in a light most favorable

to the plaintiff, this Court is of the opinion that the evidence points so strongly in favor of the defendant that reasonable minds could not come to a different conclusion, and thus the defendant's motion for judgment notwithstanding the verdict must be granted.

IT IS NOW ORDERED HEREIN that:

1. Defendant's motion for judgment notwithstanding the verdict is GRANTED; the verdict and judgment heretofore entered in favor of the plaintiff is SET ASIDE AND VACATED; judgment notwithstanding the verdict is hereby entered in accordance with Fed.R.Civ.P. 50(b).

2. In the event judgment for the defendant to be entered herein is reversed on appeal, the alternative motion of the defendant for a new trial is DENIED on the grounds that the Court can discern no prejudicial reversible error committed at trial, except the denial of defendant's

motion for directed verdict at the conclusion of all the evidence.

This 4th day of April, 1985.

S/
SCOTT REED, JUDGE